
**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

No. 06-2218:

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| WILLIAM CRAWFORD, et al., |) | |
| |) | Appeal from the United States |
| Plaintiffs-Appellants, |) | District Court for the Southern |
| |) | District of Indiana, Indianapolis |
| v. |) | Division |
| |) | |
| MARION COUNTY ELECTION |) | Cause below: No. 1:05-CV-634 |
| BOARD, |) | |
| |) | |
| Defendant-Appellee. |) | Hon. Sarah Evans Barker, Judge |

No. 06-2317:

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| INDIANA DEMOCRATIC PARTY, |) | |
| et al., |) | Appeal from the United States |
| |) | District Court for the Southern |
| Plaintiffs-Appellants, |) | District of Indiana, Indianapolis |
| |) | Division |
| v. |) | |
| |) | Cause below: No. 1:05-CV-634 |
| TODD ROKITA, et al., |) | |
| |) | |
| Defendants-Appellees. |) | Hon. Sarah Evans Barker, Judge |

**BRIEF AND REQUIRED SHORT APPENDIX OF
PLAINTIFFS-APPELLANTS, INDIANA DEMOCRATIC PARTY AND
MARION COUNTY DEMOCRATIC CENTRAL COMMITTEE**

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 06-2317
Short Caption Indiana Democratic Party v. Rokita, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a governmental party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party’s main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Indiana Democratic Party and Marion County Democratic Central Committee

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Fillenwarth Dennerline Groth & Towe
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- (3) If the party or amicus is a corporation:
 - i) Identify all its parent corporations, if any; and
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 - ii) list any publicly held company that owns 10% or more of the party’s or amicus stock.
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Attorney’s Signature: s/ William R. Groth Date: 05/15/06
Attorney’s Printed Name: William R. Groth

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d)
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TABLE OF CONTENTS

| | |
|--|-----|
| Corporate Disclosure Statement | |
| Table of Contents | i |
| Table of Authorities | iii |
| JURISDICTIONAL STATEMENT | 1 |
| STATEMENT OF ISSUES | 1 |
| STATEMENT OF THE CASE | 2 |
| STATEMENT OF FACTS | 2 |
| SUMMARY OF ARGUMENT | 5 |
| ARGUMENT | 10 |
| I. Standard of Review | 10 |
| II. Democrats have full standing to mount this facial challenge to Indiana’s Photo ID Law | 10 |
| A. The Democratic Party has associational standing to present the claims of those who vote in Democratic primaries and those who participate in party activities | 11 |
| B. The Democrats also have third-party standing to present the claims of Democratic voters | 16 |
| III. The district court erred by finding that the burdens imposed by the Photo ID Law are not severe | 20 |
| A. The district court erred by using a rational basis rather than heightened scrutiny, even though the Photo ID Law directly impinges on the core voting right | 20 |
| B. The character and extent of the Photo ID Law’s burdens on the right to vote | 25 |

| | | |
|-----|---|----|
| C. | Absentee voting by mail is not a reasonable alternative for voters lacking the required form of government-issued photo identification | 30 |
| D. | The State did not show that the Legislature actually relied upon any legislative findings that imposter voting exists in Indiana | 31 |
| E. | The severity of the burden imposed by the Photo ID Law must be evaluated in the context of the cumulative burdens imposed by Indiana’s other election laws | 34 |
| F. | The Photo ID Law’s ambiguities give overly broad discretion to election officials and challengers to determine whether photo identification “conforms” to the law’s requirements | 36 |
| IV. | In light of the fundamental importance of the right to vote, the State has the burden of showing that the Photo ID Law is both necessary and that there is evidence supporting the proffered justification for it | 38 |
| V. | The Photo ID Law severely burdens Democrats’ associational rights | 40 |
| VI. | The Photo ID Law cannot withstand heightened scrutiny | 42 |
| A. | The law’s burdens are not equally shared | 42 |
| B. | The Photo ID Law cannot survive strict scrutiny | 43 |
| C. | The Photo ID Law cannot survive intermediate scrutiny | 46 |
| | CONCLUSION | 49 |
| | CERTIFIED WORD COUNT | 51 |
| | CERTIFICATE OF SERVICE | 52 |
| | STATEMENT PURSUANT TO CIRCUIT RULE 30(d) | 54 |
| | STATUTORY APPENDIX | 56 |
| | SHORT APPENDIX | |

TABLE OF AUTHORITIES

CASES

| | |
|--|-------------------------|
| <i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983) | 18, 24, 39, 47 |
| <i>Ayers-Schaffner v. DiStefano</i> , 37 F.3d 726 (1 st Cir. 1994) | 22 |
| <i>Bay County Democratic Party v. Land</i> , 347 F.Supp.2d 404 (E.D. Mich. 2004) | 15, 44 |
| <i>Belitiskus v. Pizzingrilli</i> , 343 F.3d 632 (3 rd Cir. 2003) | 30 |
| <i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973) | 18 |
| <i>Bullock v. Carter</i> , 405 U.S. 134 (1972) | 30 |
| <i>Burdick v. Takushi</i> , 504 U.S. 528 (1992) | 6, 9, 23, 24, 35, 46-47 |
| <i>Burson v. Freeman</i> , 504 U.S. 191 (1992) | 26, 32 |
| <i>Bush v. Gore</i> , 531 U.S. 98 (2000) | 15, 22 |
| <i>California Democratic Party v. Jones</i> , 530 U.S. 567 (2000) | 40 |
| <i>Center for Individual Freedom v. Carmouche</i> , ___F.3d ___ 2006 WL 1280815, *5 (5 th Cir. 2006) | 18 |
| <i>Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n</i> , 447 U.S. 557 (1980) | 47, 48 |
| <i>Citizens for John W. Moore Party v. Bd. of Election Comm’rs</i> , 794 F.2d 1254 (7 th Cir. 1986) | 48 |
| <i>City of Chicago v. Morales</i> , 527 U.S. 41 (1999) | 38 |
| <i>City of Erie v. Pap’s A.M.</i> , 529 U.S. 277 (2000) | 33, 34 |
| <i>City of Ladue v. Gilleo</i> , 512 U.S. 43 (1994) | 45 |
| <i>City of Los Angeles v. Alameda Books, Inc.</i> , 535 U.S. 425 (2002) | 33 |
| <i>City of Renton v. Playtime Theatres, Inc.</i> , 475 U.S. 41 (1986) | 48 |

| | |
|---|------------------------|
| <i>Clingman v. Beaver</i> , 544 U.S. 581 (2005) | 12, 13, 27, 32, 35, 40 |
| <i>Colorado Republican Fed. Campaign Comm. v. FEC</i> , 518 U.S. 604 (1996) | 40 |
| <i>Common Cause/Georgia v. Billups</i> , 406 F.Supp.2d 1326 (N.D. Ga. 2005) | 31 |
| <i>Council of Alter. Political Parties v. Hooks</i> , 179 F.3d 64 (3 rd Cir. 1999) | 38 |
| <i>Delaney v. Bartlett</i> , 370 F.Supp.2d 373 (M.D. N.C. 2004) | 38 |
| <i>Democratic Party of U.S. v. Wisconsin ex rel. LaFollette</i> , 450 U.S.107 (1981) | 13, 17, 42 |
| <i>Doe v. City of Lafayette</i> , 377 F.3d 757 (7 th Cir. 2004) | 43 |
| <i>Duke Power Co. v. Carolina Env'tl. Study Group Inc.</i> , 438 U.S. 59 (1978) | 18 |
| <i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972) | 21, 22, 44, 46 |
| <i>Durkin v. Equifax Check Services, Inc.</i> , 406 F.3d 410 (7 th Cir. 2005) | 29 |
| <i>Edenfield v. Fane</i> , 507 U.S. 761 (1993) | 33, 48 |
| <i>Eu v. San Francisco County Democratic Cent. Comm.</i> , 489 U.S. 214 (1989) | 14, 40, 41 |
| <i>Florida Democratic Party v. Hood</i> , 2005 WL 2137016 (N.D. Fla. 2005) | 15 |
| <i>Freedman v. Maryland</i> , 380 U.S. 51, 57 (1965) | 20 |
| <i>G.M. Enterprises, Inc. v. Town of St. Joseph</i> , 350 F.3d 631 (7 th Cir. 2003) | 34 |
| <i>Gable v. Patton</i> , 142 F.3d 940 (6 th Cir. 1998) <i>cert. denied</i> 525 U.S. 1177 (1999) | 17 |
| <i>Grayned v. City of Rockland</i> , 408 U.S. 104 (1972) | 38 |
| <i>Green v. Northam</i> , 155 F.3d 1332 (11 th Cir. 1998) | 24 |

| | |
|---|------------|
| <i>Gresham v. Peterson</i> , 225 F.3d 899 (7 th Cir. 2000) | 38 |
| <i>Griffin v. Roupas</i> , 385 F.3d 1126 (7 th Cir. 2004) | 31, 35 |
| <i>HBO, Inc. v. F.C.C.</i> , 567 F.2d 9 (D.C. Cir. 1977) | 33 |
| <i>Harman v. Forssenius</i> , 389 U.S. 528 (1965) | 20, 21 |
| <i>Harper v. Virginia Board of Elections</i> , 383 U.S. 663 (1966) | 20, 22 |
| <i>Havens Realty Corp. v. Coleman</i> , 455 U.S. 363 (1982) | 11 |
| <i>Hess v. Reg-Ellen Machine Tool Corp.</i> 423 F.3d 655 (7 th Cir. 2005) | 10 |
| <i>Hill v. Stone</i> , 421 U.S. 289 (1975) | 22 |
| <i>Horseman v. Keller</i> , 841 N.E.2d 164 (Ind. 2006) | 31 |
| <i>Hunt v. Washington State Apple Advertising Comm 'n</i> , 432 U.S. 333 (1977) | 12, 15 |
| <i>Joelner v. Village of Washington Park</i> , 378 F.3d 613 (7 th Cir. 2004) | 34 |
| <i>Kay v. Mills</i> , 490 F.Supp. 844 (E.D. Ky. 1980) | 38 |
| <i>Kramer v. Union Free School Dist. No. 15</i> , 395 U.S. 621 (1969) | 22 |
| <i>Krislov v. Rednour</i> , 226 F.3d 851 (7 th Cir. 2000) <i>cert. denied</i> 531 U.S. 114 (2001) | 10, 27, 35 |
| <i>Kruse v. City of Cincinnati</i> , 142 F.3d 907 (6 th Cir. 1998) | 34 |
| <i>League of Women Voters v. Blackwell</i> , 340 F.Supp.2d 823 (N.D. Oh. 2004) | 44 |
| <i>Lerman v. Bd. of Elections</i> , 232 F.3d 135 (2 nd Cir. 2000) | 18 |
| <i>Louisiana v. United States</i> , 380 U.S. 145 (1965) | 38 |
| <i>Lubin v. Panish</i> , 415 U.S. 709 (1974) | 30 |
| <i>Mancuso v. Taft</i> , 476 F.2d 187 (1 st Cir. 1973) | 15 |

| | |
|---|--------|
| <i>Massey v. Wheeler</i> , 221 F.3d 1030 (7 th Cir. 2000) | 17 |
| <i>McConnell v. FEC</i> , 540 U.S. 93 (2003) | 39, 46 |
| <i>McLaughlin v. No. Car. Bd. of Elections</i> , 65 F.3d 1215 (4 th Cir. 1995) | 46 |
| <i>Medina v. City of Osawatomie</i> , 992 F.Supp. 1269 (D. Kan. 1998) | 47 |
| <i>Mescall v. Burrus</i> , 603 F.2d 1266 (7 th Cir. 1979) | 22 |
| <i>Metro Milwaukee Commerce v. Milwaukee County</i> , 431 F.3d 277 (7 th Cir. 2005) | 33 |
| <i>Miller v. Blackwell</i> , 348 F.Supp.2d 916 (S.D. Oh. 2004), <i>stay denied</i> 388 F.3d 546 (6 th Cir. 2004) | 15 |
| <i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986) | 48 |
| <i>New Alliance Party v. Hand</i> , 933 F.2d 1568 (11 th Cir. 1991) | 46 |
| <i>Nixon v. Shrink Missouri Gov't PAC</i> , 528 U.S. 377 (2000) | 39 |
| <i>Northampton County Demo. Party v. Hanover Twp.</i> , 2004 WL 887386 (E.D. Pa. 2004) | 15 |
| <i>Oregon Advocacy Center v. Mink</i> , 322 F.3d 1101 (9 th Cir. 2003) | 12 |
| <i>Organizations for a Better Austin v. Keefe</i> , 402 U.S. 415 (1971) | 19 |
| <i>Pabey v. Pastrick</i> , 816 N.E.2d 1138 (Ind. 2004) | 45 |
| <i>Pearson v. Edgar</i> , 153 F.3d 397 (7 th Cir. 1998) | 45 |
| <i>Powers v. Ohio</i> , 499 U.S. 400 (1991) | 17 |
| <i>Reform Party of Allegheny Co. v. Allegheny Co. Dept. of Elections</i> , 174 F.3d 305 (3 rd Cir. 1999) (<i>en banc</i>) | 42, 47 |
| <i>Republican Party of Minnesota v. White</i> , 536 U.S. 765 (2002) | 45 |
| <i>Retired Chicago Police Ass'n v. City of Chicago</i> , 7 F.3d 584 (7 th Cir. 1993) | 12 |

| | |
|--|-----------------------|
| <i>Reynolds v. Sims</i> , 377 U.S. 533 (1964) | 23 |
| <i>Rockefeller v. Powers</i> , 74 F.3d 1367 (2 nd Cir. 1995) | 42 |
| <i>Sabri v. U.S.</i> , 541 U.S. 600 (2004) | 18 |
| <i>Sandusky County Democratic Party v. Blackwell</i> , 387 F.3d 565 (6 th Cir. 2004) | 15, 16 |
| <i>Schrader v. Blackwell</i> , 241 F.3d 783 (6 th Cir. 2001) | 43 |
| <i>Schultz v. City of Cumberland</i> , 228 F.3d 831 (7 th Cir. 2000) | 18 |
| <i>Sec. of State of Maryland v. Joseph H. Munson Co.</i> , 467 U.S. 947 (1984) | 17 |
| <i>Smiley v. Holm</i> , 285 U.S. 355 (1932) | 39 |
| <i>Smith v. Boyle</i> , 959 F.Supp. 982 (C.D. Ill. 1997), <i>aff'd as modified</i> 144 F.3d 1060 (7 th Cir. 1998) | 15 |
| <i>Southworth v. Bd. of Regents, Univ. of Wisc. Sys.</i> , 307 F.3d 566 (7 th Cir. 2002) | 27 |
| <i>State ex rel. Gramelspacher v. Martin Circuit Court</i> , 231 Ind. 114, 107 N.E.2d 666 (1952) | 40 |
| <i>Stewart v. Blackwell</i> , 444 F.3d 843 (6 th Cir. 2006) | 16, 24 |
| <i>Summit Co. Democratic Party v. Blackwell</i> , 2004 U.S. Dist Lexis 22539 (S.D. Oh. 2004) <i>emergency stay granted pending appeal</i> 388 F.3d 547 (6 th Cir. 2004) | 15, 26 |
| <i>Swamp v. Kennedy</i> , 950 F.2d 383 (7 th Cir. 1991) | 41 |
| <i>Tashjian v. Republican Party of Connecticut</i> , 479 U.S. 208 (1986) | 14, 41 |
| <i>Thompson v. Western States Med. Ctr.</i> , 535 U.S. 357 (2002) | 47 |
| <i>Timmons v. Twin Cities Area New Party</i> , 520 U.S. 351 (1997) | 24, 40-41, 42, 47, 48 |
| <i>Tucson Woman's Clinic v. Eden</i> , 379 F.3d 531 (9 th Cir. 2004) | 24 |
| <i>Turner Broadcasting Sys., Inc. v. F.C.C.</i> , 512 U.S. 622 (1994) | 33 |

| | |
|---|----|
| <i>United Food & Commercial Workers Union Local 751 v. Brown Group, Inc</i> , 517 U.S. 544 (1996) | 15 |
| <i>United States v. Classic</i> , 313 U.S. 299 (1941) | 40 |
| <i>United States v. Salerno</i> , 481 U.S. 739 (1987) | 18 |
| <i>Village of Hoffman Estates v. Flipside, Hoffmann Estates, Inc.</i> , 455 U.S. 489 (1982) | 37 |
| <i>Virginia v. Hicks</i> , 539 U.S. 111 (2003) | 19 |
| <i>Warth v. Sedlin</i> , 422 U.S. 490 (1975) | 18 |
| <i>Watchtower Bible & Tract Society of NY, Inc. v. Village of Stratton</i> , 536 U.S. 150 (2002) | 38 |
| <i>Weinberg v. City of Chicago</i> , 310 F.3d 1029 (7 th Cir. 2002) | 39 |
| <i>Werme v. Merrill</i> , 84 F.3d 479 (1 st Cir. 1996) | 24 |
| <i>Wernsing v. Thompson</i> , 423 F.3d 732 (7 th Cir. 2005) | 19 |
| <i>Williams v. Rhoads</i> , 393 U.S. 23 (1968) | 43 |
| <i>Wirzburger v. Galvin</i> , 412 F.3d 271 (1 st Cir. 2005) | 47 |
| <i>Young v. Am. Mini Theatres, Inc.</i> , 427 U.S. 50 (1976) | 45 |

STATUTES, CONSTITUTIONAL PROVISIONS AND OTHER AUTHORITIES

| | |
|----------------------------------|-------|
| 28 U.S.C. §1291 | 1 |
| 28 U.S.C. §2201 | 1 |
| 28 U.S.C. §1331 | 1 |
| 28 U.S.C. §1343(a)(3) | 1 |
| 42 U.S.C. §1971(a)(2)(A) | 1, 10 |
| 42 U.S.C. §1973 gg-6(a)(4) | 30 |

| | |
|--|-----------|
| 42 U.S.C. §1983 | 1 |
| 42 U.S.C. §15483(b)(2)(A) | 44 |
| Ind. Code §3-5-2-40.5 | 37 |
| Ind. Code §3-5-6-6 | 37 |
| Ind. Code §3-6-1-13 | 14 |
| Ind. Code §3-6-6-1(c) | 41 |
| Ind. Code §3-6-7-2, <i>repealed by</i> 2005 Ind. Acts, P.L. 230-2005, Sec. 91 | 3 |
| Ind. Code §3-7-38-1 through -12, <i>repealed by</i> 1996 Ind. Acts, P.L. 4-1996, Sec. 108 | 5 |
| Ind. Code §3-7-38.1-1, <i>et seq.</i> (expired January 1, 2006) | 5, 30 |
| Ind. Code §3-7-38.2-2 | 5, 30 |
| Ind. Code §3-10-1-6 | 13 |
| Ind. Code §3-10-1-9 | 13 |
| Ind. Code §3-10-1-10 | 13 |
| Ind. Code §3-11-10-1.2(a) | 2 |
| Ind. Code §3-11-10-24(a)(1) | 2, 31, 36 |
| Ind. Code §3-11-4-3(4) | 31 |
| Ind. Code §3-11-8-8 | 35 |
| Ind. Code §3-11-8-15(a)(5) | 3, 26, 36 |
| Ind. Code §3-11-8-25.1(f) | 42 |
| Ind. Code §3-11-10-3 | 31 |

| | |
|--|---------------|
| Ind. Code §3-11.7-5-2.5(c)(2)(A) | 43 |
| Ind. Code §3-14-2-14 | 41 |
| Ind. Code §9-24-12-5 | 3 |
| Indiana Const. Art. 2, §2 | 2, 10 |
| First Amendment | <i>passim</i> |
| Fourteenth Amendment | <i>passim</i> |
| SEA No. 483 (“Photo ID Law”)* | <i>passim</i> |
| Federal Rule of Evidence 702 | 28 |

* Codified at Ind. Code §§3-5-2-40.5, 3-11-8-25.1(a) through (f), 3-11-10-1.2 and 3-11.7-5-2.5 and -3. These statues are reproduced in the Statutory Appendix.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. §1291 in that this is an appeal from the district court's April 14, 2006 Judgment and "Entry Granting Defendants' Motion for Summary Judgment, Denying Plaintiffs' Motion for Summary Judgment, and Denying Plaintiffs' Motion to Strike." This Entry was a final judgment as to all parties and issues. Following entry of that final judgment, the Indiana Democratic Party and Marion County Democratic Central Committee (collectively "Democrats" or "Democratic Party") filed a notice of appeal and docketing statement on May 5, 2006. The district court had federal question jurisdiction of the underlying case pursuant to 28 U.S.C. §§1331, 1343(a)(3) and 2201, as the cause was brought as a complaint pursuant to 42 U.S.C. §1983 for declaratory and injunctive relief to redress the deprivation, under color of statute, rights secured by the First and Fourteenth Amendments to the Constitution of United States, specifically the right to vote and to have one's vote counted, and to redress violations of the Voting Right Act, 42 U.S.C. §1971(a)(2)(A).

STATEMENT OF ISSUES

1. Do Democrats have standing to bring this action?
2. Does Senate Enrolled Act No. 483 (hereinafter the "Photo ID Law") violate the Voting Rights Act, 42 U.S.C. §1971(a)(2)(A), in that it provides different standards within a county for voters depending on whether they live in a state-certified residential care facility with or without a polling place?

3. Is the Photo ID Law unconstitutional because it imposes a severe burden on the right of registered voters in Indiana to vote and to have that vote counted without a sufficient justification for doing so?

4. Is the Photo ID Law unconstitutional because it violates Democrats' associational rights under the First Amendment by precluding those registered voters who are without the required form of photo identification from voting in Democrats' primary elections without a sufficient justification for doing so?

5. Does the Photo ID Law violate the Indiana Constitution, Art. 2, §2, because it imposes an additional qualification on those wishing to vote?

STATEMENT OF THE CASE

Democrats adopt the Statement of the Case contained in the brief of William Crawford, et al. (the "Crawford Plaintiffs"), in the appeal (No. 06-2218) consolidated for purposes of briefing and disposition with Democrats' appeal.

STATEMENT OF FACTS

Democrats adopt the Statement of Facts contained in the brief of the Crawford Plaintiffs. In addition to those facts, Democrats state the following relevant facts.

The Indiana General Assembly made a number of changes to Indiana's election code during the same legislative session that it enacted SEA 483. Although exempting absentee voters who cast their ballot by mail from the Photo ID Law, Ind. Code §3-11-10-1.2 the General Assembly also narrowed the classes of individuals who could cast such ballots. 2005 Ind. Acts, P.L. 103-2005, Sec. 12; Ind. Code § 3-11-10-24(a). Prior law

permitted any person who expected to be out of the county for any period of time on election day to cast an absentee ballot by mail; the 2005 changes require that they have a “specific, reasonable expectation of being absent from the county on election day *during the entire twelve (12) hours that the polls are open.*” *Id.* The General Assembly also permitted partisan political challengers to be present in the polls for the first time. 2005 Ind. Acts, P.L. 230-2005, Sec. 54; Ind. Code § 3-11-8-15(a)(5). Under prior law, challengers were required to remain outside the polls at the entrance to the chute. Ind. Code § 3-6-7-2 (2004), *repealed by* 2005 Ind. Acts, P.L. 230-2005, Sec. 91.

The General Assembly adopted a law requiring that the renewal of driver’s licenses be conducted in person at BMV branches; prior law had permitted certain renewals to be conducted via mail or the internet. 2005 Ind. Acts, P.L. 210-2005, Sec. 44; Ind. Code § 9-24-12-5. The BMV also closed a number of branches throughout the state. (Redman Dep. 34, R. Doc. 70).

Democrats submitted the expert reports of Marjorie Hershey, a Professor of Political Science at Indiana University, and Kimball W. Brace, the President of Election Data Services, Inc. Professor Hershey examined the Photo ID Law and concluded that because the law increases the costs of voting by imposing additional requirements and barriers to the exercise of that right, it is likely to decrease voter turnout, particularly among voters of lower socio-economic status. (Hershey Report 12-17; and Hershey Supplemental Aff. ¶¶ 2-3; Jt. App. 196-201, 229-30). Hershey’s conclusions were based upon her review of numerous empirical studies establishing that where “the obstacles to

voting are greater, turnout will be lower.” (Hershey Report 5-10; Jt. App. 189-94).

Brace performed an analysis of the number of registered voters in Marion County who currently possess driver’s licenses and photo IDs issued by the BMV, comparing records provided by the BMV and the Marion County Board of Voter Registration that were both compiled and current as of August, 2005. (Brace Report 4-10; Jt. App. 161-67). Using commonly-accepted matching methods, Brace matched the data in the two files for the purpose of determining which registered voters in Marion County possessed, as of August of 2005, a photo ID issued by the BMV. (Brace Report 6-10; Jt. App. 163-67). Brace concluded from this matching process that a minimum of 51,392 of the 610,556 registered voters in the county lacked BMV-issued photo ID since no match could be found between the two files when comparing only the first and last names of persons within the two files, the loosest possible matching criteria designed to create the greatest number of possible matches. (Brace Report 6-9 and Table C; Jt. App. 163-66, 178). When the additional criteria of date of birth (a more unique identifier designed to avoid matching different persons with similar names) was added to the matching process, a total of 140,569 registered voters in Marion County could not be matched to persons with photo IDs issued by the BMV. (Brace Report 8-9, Table E; Jt. App. 165-66, 180). Thus, Brace concluded that a minimum of 51,392, but as many as 140,569, registered voters in Marion County lacked BMV identification. (Brace Report 10; Jt. App. 167).

Brace also noted in his report that certain voters were identified as inactive in the voter registration files and recognized that this could be the result of efforts by election

officials to purge voter rolls in accordance with the National Voter Registration Act. (Brace Report 9; Jt. App. 166). Prior to March 16, 2004, state law only permitted the state to conduct voter list maintenance programs, designed to remove voters who have died or moved from registration rolls. See Ind. Code §§ 3-7-38.1-1 to 3-7-38.1-11; Ind. Code § 3-7-38-1 to 3-7-38-12, *repealed by* 1996 Ind. Acts, P.L. 4-1996, Sec. 108; and Appendix to Democrats' Summary Judgment Motion, Ex. 27; and Ex. 26, Interrogatory No. 4, R. Doc. 107. In 2004 the General Assembly adopted a law that permits, but does not require, counties to conduct such programs. *Id.*; *see also*, 2004 Ind. Acts, P.L. 14-2004, Sec. 49; Ind. Code § 3-7-38.2-2. Between 1995 and 2004, the State Election Division's only participation in voter list maintenance was a program designed to eliminate duplicate registrations, where a particular voter was registered at more than one address. (Appendix to Democrats' Summary Judgment Motion, Ex. 26, Interrogatory No. 1, R. Doc. 107). Although the Election Division gathered information on duplicate registrations pursuant to this program and forwarded the results to the counties, the State is unaware of whether the counties actually eliminated duplicate registrations using that information. *Id.*

SUMMARY OF ARGUMENT

Democrats have full standing to present the constitutional and statutory claims of all voters associated with the Democratic Party who lack identification satisfying the requirements of the Photo ID Law. Democrats have both associational standing and third party standing to present the claims of these voters. Voters who support the Democrats

by voting in a party primary, voting for party candidates or providing service to Democrats by, for example, working as election officials or providing financial support are sufficiently associated with Democrats to be the “substantial equivalent” of members for purposes of associational standing. Accordingly, Democrats may represent these voters because the voters would have standing to sue in their own right, the interests that Democrats seek to protect are germane to its purposes, and the declaratory and injunctive relief requested does not require the participation of individual members.

Third party standing exists where the third party can show a close relationship between itself and another party and there is an obstacle to the other party’s ability to protect its own interest. Democrats have third party standing here because the Photo ID Law may infringe on the rights of voters associated with Democrats at the time these voters attempt to vote when it is too late for these voters to vindicate their own rights. Such infringement also causes injury to Democrats because Democrats will lose the votes of individuals not permitted to cast ballots that are counted. Democrats also have direct standing because the Photo ID Law causes injury to their principal activities by requiring them to expend resources to deal with the effects of the law.

The Indiana Photo ID Law disenfranchises otherwise eligible voters simply because they do not have the one form of identification that the statute permits and requires. This burden of disenfranchisement is the most severe burden that any election law can impose. The district court erroneously applied the *Burdick* sliding scale analysis and erroneously concluded that the burden imposed by the statute was not severe so strict

scrutiny was not required. The district court failed to recognize that the relevant burden in this analysis, in accordance with Supreme Court precedent, is the burden of disqualification imposed on voters in the classification that the statute creates – voters who do not possess identification satisfying the statute’s requirements. Instead, the district court mistakenly focused only on the burden to which voters are put to obtain the required identification and thereby escape the disqualifying impact of the law. Moreover, the district court misapprehended the severity of the burden to which individuals are put in order to obtain the required identification and failed to recognize the severity of the burden involved in that process when measured in terms of the required time, expense and inconvenience. The district court also failed to properly assess the burden that the Photo ID Law imposes on voters who attempt to vote without such an ID and are required to make a second trip to the office of the county election board to either present a photo ID or sign an affidavit of indigency. Finally, the district court failed to properly assess the burden that the Photo ID Law imposes on voters who are subject to intimidation at the polls by challenges that their ID does not meet the statute’s requirements.

Contrary to the district court’s conclusion, absentee voting is not a reasonable alternative for voters without the required photo ID for a number of reasons including the fact that absentee ballots are only available to limited classes of individuals, including those who are able to certify under oath that they will be absent from the county for the entire time the polls are open.

Although the State attempts to justify the Photo ID Law on the grounds that it is a

corrective for in-person voting fraud, it failed to establish either a compelling state interest to justify the law or any reasons that the Law is necessary. The undisputed evidence is that there is no reported case of in-person voting fraud in the history of Indiana. Further, the undisputed evidence established that the Legislature did not consider or rely on any evidence relating to imposter voting fraud other than unsubstantiated anecdotes. The State's conclusory, but factually unsupported, claim that the law is designed to counter fraud does not meet the State's heavy burden of demonstrating the necessity for the Photo ID Law's burden on the fundamental right to vote.

The severity of the burden imposed by the Photo ID Law must be assessed in the context of the cumulative burdens imposed by all of Indiana's election laws. These other laws combine to provide a setting in which Indiana polls close earlier than the polls in all but two other states, Indiana voters, unlike those in thirty (30) other states, do not have the right to take time off from work to vote and must face partisan challengers at the polls, Indiana voters cannot vote absentee except under limited circumstances, and because of recent closings of numerous license branches, many Indiana voters must travel further to obtain a photo ID. The combined effect of these regulations constitutes a severe burden on the right to vote thereby requiring strict scrutiny.

The Photo ID Law is unconstitutionally vague. The statute gives election officials and partisan challengers broad discretion to determine whether photo identification presented by voters meets the requirements of the statute because it requires the voter's

name on the ID to “conform” to the name “in the individual’s voter registration record,” but it fails to provide any standards for making this determination and leaves it up to election officials to determine whether the name on the photo ID must be identical to the voting record or whether substantial similarity is sufficient.

The Photo ID Law severely and unconstitutionally burdens Democrats’ associational rights by limiting the group of voters whom the Democratic Party may invite to participate in its primary elections to those individuals who have obtained the particular form of identification required by the statute. Democrats have no desire to exclude voters who do not possess the required identification from participating in their primary election, and the State has not demonstrated a sufficiently compelling reason to justify the Law’s substantial intrusion into the associational freedoms of Democrats and their adherents.

The Photo ID Law cannot withstand heightened scrutiny. Strict scrutiny requires that the Law be justified by a compelling state interest and narrowly tailored to serve that interest. The State has failed to establish a compelling interest to justify the Law. In addition, the Law could have been tailored much more narrowly to serve the interests that the State asserts. Further, narrow tailoring requires that a statute cannot be overinclusive nor underinclusive. By exempting from its reach absentee voting – the one type of voting for which there is a substantial history of fraud – the Law is fatally underinclusive under the strict scrutiny analysis. The law is also overinclusive. Moreover, even if less than strict scrutiny is required under *Burdick*, the Photo ID Law cannot withstand any form of

heightened scrutiny because the State has wholly failed to show that the Photo ID Law is necessary to combat a genuine problem or that the law will ameliorate the State's professed concerns in a way that will not suppress more voting than the amount of fraud that it prevents.

ARGUMENT¹

I. Standard of Review

The standard of review to be applied by this Court is *de novo* as this is an appeal from the district court's ruling on cross-motions for summary judgment. *Hess v. Reg-Elten Machine Tool Corp.*, 423 F.3d 655, 658 (7th Cir. 2005). With cross-motions, all inferences from the evidentiary record must be construed in favor of the party against whom the motion is made. *Id.* Where there are no material facts in dispute, the character and extent of the burdens imposed in facial challenges to election laws is a question of law, which is reviewed *de novo*. *Krislov v. Rednour*, 226 F.3d 851, 859 (7th Cir. 2000), *cert. denied* 531 U.S. 114 (2001).

II. Democrats have full standing to mount this facial challenge to Indiana's Photo ID Law.

The district court erroneously concluded that the Democratic Party had only limited standing to present its claims. Although the district court found that the Democratic Party had organizational standing to present its own claim that the Photo ID

¹ Democrats hereby adopt the arguments in the Crawford Appellants' brief that the Photo ID Law violates the Voting Rights Act, 42 U.S.C. §1971(a)(2)(A) and their arguments that the Photo ID Law violates the Indiana Constitution, Art. 2, §2, because it imposes an additional qualification on those wishing to vote.

Law interferes with its First Amendment right to associate with primary voters,² the district court also concluded that the Democrats’ associational standing was limited to presenting the equal protection claims of several named individuals who lack qualifying identification and that its third-party standing was limited to presenting only the claims of voters who inadvertently fail to bring their identification to the polls. (Short App. 59-64).

- A. The Democratic Party has associational standing to present the claims of those who vote in Democratic primaries and those who participate in party activities.

In concluding that the Democratic Party lacks associational standing (except for the equal protection claims of a few named individuals), the district court found that persons who vote for or desire to vote for Democratic Party candidates are neither members nor the substantial equivalent of members of the Party. (Short App. 59-60). The district court cited no authority for this conclusion. Not only is this incorrect as a matter of law, but the Democrats have not limited their claim of associational standing only to those individuals who vote or desire to vote for Democratic Party candidates, but rather have sought standing on behalf of voters lacking qualifying identification who may associate with the party in other ways.

The associational standing doctrine permits organizations to represent the interests

² The district court did not address the Democrats other organizational standing claim, which was based upon injury to their principal activities because the Photo ID Law will drain organizational resources to deal with the effects of the law. (Democrats’ Summary Judgment Reply Brief at 12, R. Doc. 103) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (an organization has standing to sue in its own right if it has suffered a “concrete and demonstrable injury to the organization’s activities”) and *Ed Treacy Aff., Ex. 23* to Democrats’ Summary Judgment Reply Brief, R. Doc. 106 (Marion County Democratic party chairman testifying that Photo ID Law will require party to divert resources from its principal activities)).

of its members or the “substantial equivalent” of members, where its members would otherwise have standing to sue in their own right, the interests the organization seeks to protect are germane to its purposes, and the relief requested does not require the participation of individual members. *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977); *Retired Chicago Police Ass’n v. City of Chicago*, 7 F.3d 584, 600 n.21 (7th Cir. 1993). For purposes of determining whether an organization’s constituents or adherents are the “substantial equivalent” of members, courts will not “exalt form over substance,” *Hunt*, 432 U.S. at 345, and the “purposes that undergird” the concept of associational standing – “that the organization is sufficiently identified with and subject to the influence of those it seeks to represent” – must remain in mind. *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1111 (9th Cir. 2003) (holding that advocacy organization for mentally ill criminal defendants had associational standing as constituents were functional equivalent of members); *see also, Hunt*, 432 U.S. at 345 (holding that a state agency was permitted to represent the interests of state apple growers and dealers where they possessed the indicia of membership in an organization, including the election of members of the Commission and financial support of the organization).

In Indiana voters do not register to vote as members of a political party. *See* Ind. Code §3-7-31-5. Thus, identifying party members is not as easy in Indiana as in other states where the registration apparatus of the state requires voters to identify their political affiliation in order to vote in party primaries. *See, Clingman v. Beaver*, 544 U.S. 581, 584-85 (2005) (considering Oklahoma registration laws requiring party affiliation in order

to vote in primary). For a voter to cast a ballot in a political party's primary, however, Indiana's election code requires that the voter either have supported a majority of the party's nominees in the past general election or express an intention to support a majority in the upcoming general election. Ind. Code §3-10-1-6. Therefore, participation in a party primary is contingent upon a showing of past or future support for the party's nominees. Ind. Code §§3-10-1-9 and 10 (permitting party members to challenge voters who are not party supporters, and requiring affirmation of support for party candidates by challenged voter in order to cast a ballot). Voting in the Democratic Primary is sufficient to conclude that an individual is a member of the Democratic Party.³ See *Clingman*, 544 U.S. 601 (O'Connor, J., concurring) ("casting a ballot in a given primary may, for both the voter and the party, constitute a form of association that is at least as important as the act of registering"); *Democratic Party of U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 129 n.2 (1981) (Powell, J., dissenting) ("[T]he act of voting in the Democratic primary fairly can be described as an act of affiliation with the Democratic Party.").

Furthermore, the Indiana Democratic Party has broadly provided in its internal rules that "Any legally qualified voter who supports the purposes of the Party may be a member," and that members who have voted in the most recent Democratic primary are eligible to serve as party officials and delegates. (State's Ex. 52, p. 4, Appendix in Support of State's Summary Judgment Motion, R. Doc. 86). As such, the district court's

³ Over 280,000 voters cast ballots in the statewide Democratic primary in 2004. (State's Ex. 50, Interrogatory No. 2, Appendix in Support of State's Summary Judgment Motion, R. Doc. 85).

conclusion that persons who vote for Democratic candidates, including in Democratic Party primaries, are not party members is contrary to the Democratic Party's internal rules. The Democrats' right to self-define its membership is both constitutionally protected and sanctioned by state law. *See, Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (political party has the right under freedom of association to "identify the people who constitute the association"); *see also*, Ind. Code § 3-6-1-13 (authorizing state party committees to adopt rules to provide for "all matters of internal party government").

Moreover, the district court failed to consider the myriad of other ways that voters can support the purposes of the Party, and thereby become a member, including service as precinct election officials and committee persons and financial support of the Party and its candidates. In *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), the Court observed:

A major state political party necessarily includes individuals playing a broad spectrum of roles in the organization's activities. Some of the Party's members devote substantial portions of their lives furthering its political and organizational goals, others provide substantial financial support, while still others limit their participation to casting their votes for some or all of the Party's candidates. Considered from the standpoint of the Party itself, the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not be in any sense the most important.

Id. at 215. As this commentary makes clear, the district court has exalted form over substance in concluding that the Democratic Party lacks standing to represent those persons who vote in their primary election and engage in other forms of support. At a

minimum, such support constitutes sufficient indicia of membership in the Democratic Party to meet the substantial equivalent of membership test of *Hunt*. The case for Democrats' associational standing is further buttressed by the nature of the relief sought—declaratory and prospective injunctive relief—which does not require the participation of any individual members. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996).

Numerous courts have held that political parties have standing to represent the claims of their members and voters. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004); *Smith v. Boyle*, 959 F.Supp. 982, 986 (C.D. Ill. 1997), *aff'd as modified*, 144 F.3d 1060 (7th Cir.1998); *Florida Democratic Party v. Hood*, 2005 WL 2137016 (N.D. Fla. 2005); *Bay County Democratic Party v. Land*, 347 F.Supp.2d 404, 422 (E.D. Mich. 2004) (“political parties and candidates have standing to represent the rights of voters”); *Miller v. Blackwell*, 348 F.Supp.2d 916 (S.D. Oh. 2004), *stay denied* 388 F.3d 546 (6th Cir. 2004); *Northampton County Demo. Party v. Hanover Twp.*, 2004 WL 887386, at *6-8 (E.D. Pa. 2004); *Summit Co. Democratic Party v. Blackwell*, 2004 U.S. Dist Lexis 22539 (S.D. Oh. 2004). Candidates also have been found to have standing to assert the interests of voters whose rights have been burdened or impaired by a state election law. *See, e.g., Bush v. Gore*, 531 U.S. 98 (2000) (permitting presidential candidate to assert the interests of Florida voters to have their votes properly counted in a recount); *Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir.1973) (“That voters and candidates may attack candidacy restrictions affecting voting rights on their face seems

indisputable”).

In *Sandusky*, the Sixth Circuit held that the Democratic Party had associational standing to present the claims of its members, even though the voters who might be affected by the practice being challenged could not be ascertained prior to the election. 387 F.3d. at 574.⁴ As the district court recognized, the Democrats identified seven of their members who lack qualifying identification. (Short App. 61-62). Nevertheless, the Democrats are not required to name any of its members who will be harmed in advance of the election. *Sandusky*, 387 F.3d at 574. Here, the Democrats have associational standing to present the claims of all persons who lack qualifying identification and who vote in Democratic primary elections or otherwise support the Democratic Party.

B. The Democrats also have third-party standing to present the claims of Democratic voters.

The district court concluded that the Democratic Party lacks third-party standing to present the claims of voters who face “insurmountable barriers” to obtaining qualifying photographic identification, finding that the injury to such persons is sufficiently identifiable to permit such individuals to bring their own claims and that there is no evidence that any such voters exist. (Short App. 60-61). The district court’s conclusion was based upon the flawed premise that the Democrats have limited their claims to those persons who face “insurmountable barriers” to obtaining identification. To the contrary, the Democrats claims are made on behalf of *all* registered voters associated with the Party

⁴ The Sixth Circuit recently reaffirmed this holding in *Stewart v. Blackwell*, 444 F.3d 843, 854 (6th Cir. 2006).

who lack qualifying identification because all face a severe burden in the exercise of their right to vote, irrespective of whether the Photo ID Law ultimately proves to be an insurmountable hurdle to the exercise of that right. *See, infra* at III. A. and Democrats' Second Am. Compl't ¶¶ 2, 17-19, 32 (R. Doc. 43). There is ample evidence of voters who lack qualifying identification, a reality that the district court accepted as true. (Short App. 32-34; 82).

Third party standing exists where a third-party plaintiff can show a close relationship between the first and third party and some obstacle to the first party's ability to protect his own interest. *Massey v. Wheeler*, 221 F.3d 1030, 1035 (7th Cir. 2000) (*citing Powers v. Ohio*, 499 U.S. 400, 411 (1991)). And where the third party seeks to vindicate First Amendment rights, the Supreme Court has "relaxed the requirement that the plaintiff show some obstacle to the first party's ability to bring his own claim", especially where, as here, the plaintiff is bringing a facial challenge to an overbroad statute, and where the first parties are "unlikely to bring a First Amendment action on their own behalf." *Id.* (*citing Sec. of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984)). In such cases the normal cautionary approach to standing is outweighed by the potential chilling effect on protected speech. Since the Supreme Court has repeatedly held that "[a]ny interference with the freedom of a [political] party is simultaneously an interference with the freedom of its adherents," *Gable v. Patton*, 142 F.3d 940, 946 (6th Cir. 1998) *cert. denied* 525 U.S. 1177 (1999) (quoting *LaFollette*, 450 U.S. at 122), the requisite close relationship between the IDP and its adherents who vote

in its primary and for its candidates in the general election is axiomatic.⁵

Although facial challenges to statutes are generally disfavored because they invite judgments on “fact-poor records”, in the First Amendment context⁶ there can be concerns “weighty enough to overcome [the Court’s] well-founded reticence” to entertain facial challenges. *Sabri v. U.S.*, 541 U.S. 600, 609-10 (2004). Thus, a chilling of speech because of the mere existence of an allegedly vague and/or overbroad statute, including one regulating elections, can be sufficient injury to support standing. *Lerman v. Bd. of Elections*, 232 F.3d 135, 144 (2nd Cir. 2000). In a facial challenge under the First Amendment a plaintiff need only show that a statute “might operate unconstitutionally under some conceivable set of circumstances.” *Center for Individual Freedom v. Carmouche*, ___ F.3d ___, 2006 WL 1280815, *5 (5th Cir. 2006) (citing *U.S. v. Salerno*, 481 U.S. 739, 745 (1987)). Accordingly, traditional Article III standing requirements are relaxed in First Amendment facial challenges to statutes under the overbreadth doctrine, where there is a “realistic danger” that the challenged law “will significantly compromise the First Amendment rights of parties not before the Court”. *Schultz v. City of Cumberland*, 228 F.3d 831, 850 (7th Cir. 2000); *see also Broadrick v. Oklahoma*, 413

⁵ Although associational standing does not require injury to the association, *Warth v. Sedlin*, 422 U.S. 490, 511 (1975), third-party standing does. *Duke Power Co. v. Carolina Envtl. Study Group Inc.*, 438 U.S. 59, 80 (1978). The district court acknowledged that “the potential exclusion of votes by individuals intending to vote for Democratic candidates is sufficient to constitute an injury in fact to the Democrats;” thus the injury for third-party standing exists. (Short App. 61).

⁶ Although the right to vote is not directly mentioned in the Constitution, voting directly implicates the First Amendment and is entitled to its protections. *See, Anderson v. Celebrezze*, 460 U.S. 780, 786-88 (1983).

U.S. 601, 612 (1973) (holding that where First Amendment concerns are at stake, a plaintiff may “challenge a statute not because his own rights are violated, but because . . . the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression”); *see also Wernsing v. Thompson*, 423 F.3d 732, 743-44 (7th Cir. 2005) (a plaintiff does not lack standing to mount a facial challenge because he has not actually yet been denied the opportunity to speak or been punished for doing so). Nothing in this Court’s or the Supreme Court’s standing jurisprudence required Democrats to identify a particular number of registered voters who, because they did not possess qualifying photo ID, would be actually disenfranchised by the Photo ID Law’s new requirements.

Furthermore, the district court’s conclusion that the Democrats lack standing because individuals harmed by the law might bring their own challenges is wrong because the availability of as-applied challenges is not inimical to a pre-enforcement facial challenge to a statute which impairs core voting rights. Case-by-case litigation is itself a considerable burden and many persons, rather than undertaking that burden, “will choose simply to abstain” from exercising important First Amendment rights. *Virginia v. Hicks*, 539 U.S. 111, 119 (2003). Moreover, since a system of prior restraints of expression comes to the courts bearing a heavy presumption against its constitutional validity, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971), and given the fragile and perishable nature of the right to vote, without the availability of a prompt, final judicial decision it may prove too burdensome as a practical matter for a voter

denied the right to vote to seek review of a decision regarding his voting eligibility. Standing to make a facial challenge exists where the “apparatus operates in a statutory context in which judicial review may be too little and too late”. *See, e.g., Freedman v. Maryland*, 380 U.S. 51, 57 (1965).

III. The district court erred by finding that the burdens imposed by the Photo ID Law are not severe.

- A. The district court erred by using a rational basis analysis rather than heightened scrutiny, even though the Photo ID Law directly impinges on the core voting right.

In a line of cases, the Supreme Court has addressed state laws that deny the right to vote to various classifications of potential voters, and in each case it has explicitly or implicitly applied strict scrutiny. In *Harman v. Forssenius*, 389 U.S. 528 (1965), the Court struck down a Virginia statute that conditioned the right to vote on the annual filing of a certificate of residence or, in the alternative, payment of a poll tax. The Court struck the statute down because it “unquestionably erects a real obstacle to voting in federal elections for those who assert their constitutional exemption from the poll tax”, further noting that such constitutional deprivations could not be justified by some “remote administrative benefit to the State”. 380 U.S. at 541-43.

The following year, the Court applied the Fourteenth Amendment to strike down a provision of Virginia’s state constitution that conditioned the right to vote in state elections on the payment of an annual poll tax of \$1.50. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). The Court, after first noting that the right of suffrage is a “fundamental matter in a free and democratic society”, went on to hold that the “principle

that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote *or who fail to pay*". 383 U.S. at 667-68 (emphasis added).

In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Court addressed a challenge to Tennessee's durational residency requirement on the right to vote. Before beginning its consideration of whether Tennessee had established a compelling state interest in its durational residency requirements, the Court noted that showing that the residency requirements further a substantial state interest, standing alone, would not be sufficient. It also observed that statutes affecting constitutional rights must be drawn with "precision" and must be "tailored" to serve their legitimate objectives. Further, the Court held that "if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally-protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" 405 U.S. at 343. The Court acknowledged that Tennessee had a legitimate interest in identifying persons who were bona fide residents and limiting the franchise to those individuals, but the fact that the State's classification excluded persons who the State appropriately wanted to exclude was insufficient because the crude classification also excluded many bona fide residents and was "all too imprecise". 405 U.S. at 351.

These cases unequivocally establish that state laws that infringe the right to vote are subject to strict scrutiny. *Harman v. Forssenius*, 380 U.S. at 543 ("[I]n this case the State has not demonstrated that the alternative requirement is in any sense necessary to

the proper administration of its election laws.”); *Harper v. Virginia Board of Elections*, 383 U.S. at 667 (“[A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626-27 (1969) (“if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest”); *Dunn v. Blumstein*, 405 U.S. at 335 (“[W]hether we look to the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel) we conclude that the State must show a substantial and compelling reason for imposing durational requirements.”).

These cases also announced the constitutional underpinnings of more recent court decisions regarding restrictions on the right to vote. *See, e.g., Bush v. Gore*, 531 U.S. at 104-05 (“Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another”); *Hill v. Stone*, 421 U.S. 289, 297 (1975) (any direct restriction on the right to vote other than residence, age and citizenship must promote a compelling state interest); *Mescall v. Burrus*, 603 F.2d 1266, 1269 (7th Cir. 1979) (same); *Ayers-Schaffner v. DiStefano*, 37 F.3d 726, 729-30 (1st Cir. 1994) (an election law which is not structural but goes instead to the heart of the right to vote and denies the rights of persons who have already satisfied the state’s voting requirement is a severe burden which must be strictly scrutinized). Accordingly, any new condition placed on the rights of registered voters who have

already complied with all Indiana Constitutional requirements for voting eligibility “must be carefully and meticulously scrutinized.” *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

Contrary to this precedent, the district court concluded that strict scrutiny of the Indiana Photo ID Law was not warranted. In so concluding, it relied on *Burdick v. Takushi*, 504 U.S. 528 (1992), and held that under the *Burdick* analysis the Photo ID Law presented only a minimal burden on voters and thus strict scrutiny could be dispensed with. The district court’s conclusion was erroneous for two reasons. First, *Burdick* did not overrule or purport to deviate from the Supreme Court’s holdings from *Harman* to *Dunn* that where a state law operates to prevent an otherwise qualified and eligible voter from voting, strict scrutiny is required. Second, unlike its progenitors, *Burdick* did not involve a law that prevented a single voter from casting a ballot or having that vote tallied. The Hawaii prohibition on write-in voting at issue in *Burdick* did not preclude the plaintiff in that case from voting, only from writing in whatever name he wanted on the ballot. As in the earlier Supreme Court cases, the burden imposed by the Photo ID Law when it is applied to the classification of voters it creates— those who do not have the required form of photo identification—is to prevent prospective voters in this classification from voting. That is the ultimate burden that a voting regulation can impose, and it is one that, unlike restrictions on ballot access by candidates, requires strict scrutiny under the applicable precedent.

Although the Supreme Court has made clear that, “[n]o bright line separates permissible election-related regulation from unconstitutional infringement on First

Amendment freedoms,” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997), the cases line up on one side between laws which directly burden and condition the exercise of the franchise and, on the other, indirect burdens such as laws limiting candidates’ access to the ballot, the latter being subject to the sliding-scale analysis of *Burdick*, and the former being subjected to strict scrutiny in keeping with the fundamental nature of the right to vote and the severity of the burden imposed. *See, e.g., Stewart v. Blackwell*, 444 F.3d at 861 (“The burden on the franchise in *Burdick* pales in comparison to the burden in this case”); *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 544 (9th Cir. 2004) (“the ballot access cases [*Anderson v. Celebrezze*, *Burdick* and their progeny] replaced strict scrutiny with a less stringent standard of review *for reasonable laws regulating ballot access rather than infringing core voting rights*”) (emphasis added); *Green v. Northam*, 155 F.3d 1332, 1337 (11th Cir. 1998) (the *Anderson/Burdick* balancing test “controls challenges to ballot access requirements”); *Werme v. Merrill*, 84 F.3d 479, 485 (1st Cir. 1996) (applying rational basis analysis to an election law because the law had “no direct impact on ballot access, on the right to vote, or on the right to have one’s vote tallied”).

The district court erred by focusing on what voters must do to avoid the effect of the law rather than upon the impact of the law on the voters within the classifications that the law creates. The relevant question is not how difficult it is to avoid the classification the law creates, but rather how burdensome is the law on the voters in that classification. Since the burden imposed by the law is to deny the right to vote to those registered voters

who are without the required form of photo identification, the burden is, in accordance with unequivocal Supreme Court precedents, a severe one requiring that the law creating that burden be strictly scrutinized.

- B. The character and extent of the Photo ID Law's burdens on the right to vote.

In addition to the ultimate burden imposed on voters unable or unwilling to comply with the law's requirements, i.e., disenfranchisement, there are also severe burdens imposed on certain voters who attempt compliance. Those burdens fall into three general categories. The first burden is that imposed upon voters who did not possess qualifying identification when the law took effect and who therefore are required as a condition to voting and having their vote counted to travel to one of the decreasing number of BMV branches⁷ with the myriad documents needed to obtain a photo ID card, which is now a *de facto* license required to vote. The costs associated with that travel and with the procurement of necessary identifying documents such as a certified birth certificate all constitute burdens.

The second burden is that placed upon voters, particularly indigent voters, who are unable to obtain the required form of photo identification by election day and who will be forced, under this law, to make a special trip to the office of the county election board, and to bear the costs associated with such a trip, to present in person the required form of identification or to sign an indigency or religious objector affidavit after having cast a

⁷ The State acknowledged, and the district court so noted, that the BMV has recently closed numerous branches throughout the State, thereby increasing travel costs for some individuals to reach a branch office. (Short App. 20).

provisional ballot.

The third burden, which is distinct from the first two, involves the potentiality of intimidation of voters by precinct poll workers (including partisan political challengers, who are now permitted inside the polling place as a result of contemporaneous changes in the Indiana election code and who are expressly also permitted to challenge voters, Ind. Code § 3-11-8-15(a)(5) and-20)⁸, through enforcement of the ambiguous requirements of the new Photo ID Law. As the Supreme Court observed in *Burson v. Freeman*, 504 U.S. 191, 206-07 (1992), even less than blatant acts of interference with voters entering the polling place may “drive the voter away before remedial actions can be taken”. *See also Summit Co. Democratic Central Comm. v. Blackwell*, 2004 U.S. Dist Lexis 22539 (S.D. Oh. 2004) (finding that the presence of partisan challengers may pose an undue burden on voters and election officials, where the State made no showing that the presence of such challengers was necessary to insure the integrity of the voting process), *emergency stay granted pending appeal*, 388 F.3d 547 (6th Cir. 2004).

The district court found that none of these burdens was severe, even as to those registered voters who do not drive and thus do not have a driver’s license because, in its view, “the individuals and groups that Plaintiffs contend will be disproportionately impacted by SEA 483 all appear fully capable of availing themselves of the law’s

⁸ The County Defendants concede, and the district court found, that the opportunities for partisan political challengers to challenge voters under the Photo ID Law has increased as a result of the new photo identification requirements. (Short App. 15). Plaintiffs also introduced uncontroverted evidence that registered voters in the poor and minority communities are extremely intimidated by challengers and frequently left the polls after being challenged without voting, even when the challenges were non-meritorious. (Short App. 28-29).

exceptions [for mail-in absentee voting] so that they do not need to obtain photo identification in order to vote. . .[and t]hus, there is no basis to attribute or extend the burdens of obtaining a driver's license or identification card from the BMV to the act of voting.” (Short App. 85). The district court further found that though there “might be registered voters who do not qualify for an exception and, thus, will have to obtain photo identification in order to vote,” it remained unpersuaded that these burdens were severe enough to warrant strict scrutiny because “no admissible evidence [h]as been adduced to establish their numerosity or even their existence”. *Id.* n.75.

The district court misapprehended the nature of Plaintiffs' claims and burdens. In this facial challenge, Plaintiffs were *not* required to show that any voter would be disenfranchised by the challenged law though, as the State and the district court conceded, disenfranchisement of some registered voters by virtue of the existence of this law is inevitable. *Southworth v. Bd. of Regents, Univ. of Wisc. Sys.*, 307 F.3d 566, 578-81 (7th Cir. 2002) (in facial challenges, Plaintiffs are not required to present actual examples of discrimination). A restrictive election law which merely forces a candidate (or by implication a voter) to unnecessarily expend money, time and resources constitutes a substantial burden, *Krislov*, 226 F.3d at 860, and an election law whose burdens on expressive or associational activity are “severe”, *Clingman*, 544 U.S. at 586, or which has anticompetitive intentions or effects, *id.* at 603 (O'Connor, Jr., concurring), requires the application of heightened scrutiny.

That the Photo ID Law will raise the cost of voting by imposing additional

requirements and barriers was not seriously disputed by the State in the court below. As is explicated by the largely unchallenged report of Professor Marjorie Hershey, this increased cost will decrease voter turnout by discouraging registered voters who are without the required form of photo identification, particularly those registered voters of lower socio-economic status, from taking the measures necessary to obtain the required form of government-issued identification now required as an absolute condition to being allowed to vote and have one's vote counted. (Hershey Report 12-17; Jt. App. 196-201). Prof. Hershey observed that the costs imposed by the law - - the time, transportation and fees charged to obtain documents, such as certified copies of birth certificates - - would fall with particular harshness upon disabled persons, homeless persons, persons without automobiles, people of color, language minorities, and the elderly. (*Id.*; Jt. App. 201).

Furthermore, the Democrats submitted the report of Kimball Brace, who testified, based upon his matching of BMV records to voter registration records in Marion County, that a minimum of 51,392 registered voters, and more likely 140,569 registered voters, in Marion County lacked photographic identification issued by the BMV as of August, 2005.⁹ The district court refused to consider Brace's findings based upon its conclusion the report did not meet the standards for admissibility required by Federal Rule of

⁹ Although the district court criticized Brace's comment that "*If these patterns were to hold true for the rest of the state, as many as 989,000 registered voters in the state could be challenged*" (emphasis added) (Short App. 47), Brace's report plainly dealt exclusively with Marion County and was not an attempt to reach conclusions regarding the remainder of the state.

Evidence 702. (Short App. 43-44).¹⁰ The district court did not take issue with the matching process that Brace employed to reach these numbers; rather the court's criticism was directed at the conclusion that this number of registered voters risked disenfranchisement since Marion County's voter rolls are inflated and include persons who have either moved or died. (Short App. 44-49).

Given that there is no dispute regarding the reliability of the matching process Brace employed, the district court abused its discretion by refusing to consider the data that Brace's report reveals.¹¹ Marion County's voter rolls contain at least 51,392 registrations of persons who, if they still reside at the address, are entitled to vote but for the fact that they lack a qualifying form of identification.¹² As to the district court's primary criticism, no one disputes that voter rolls in Indiana and Marion County are inflated, a fact that Brace acknowledged in his report. (Brace Report 9; Jt. App. 166). The numbers Brace reported may include persons who no longer vote from a particular address. But this does not mean that the data he reports are inadmissible and unworthy of consideration. Brace's report reasonably leads to the inference that there are thousands of

¹⁰ Although purporting to exclude the report, the district court later states that the "Brace report carries some weight, albeit very little," and utilizes certain of Brace's findings to bolster its own conclusions. (Short App. 54).

¹¹ In reviewing a district court's decision to exclude expert testimony, this Court applies a two-step analysis. *Durkin v. Equifax Check Services, Inc.*, 406 F.3d 410, 420 (7th Cir. 2005). The court reviews *de novo* whether the district court properly followed the *Daubert* framework. *Id.* The court's decision to bar an expert's testimony is reviewed for an abuse of discretion. *Id.*

¹² It may be that some of these voters possess qualifying forms of identification, such as a passport, that meet the requirements of the law. But all parties acknowledge that BMV-issued identification is the most common and likely form of identification. (Short App. 15).

voters in Marion County alone who may face difficulties as a result of this new law, even though the precise number is indeterminable. Therefore, not only are the burdens that each individual voter faces severe, but there are large numbers of registered voters who face them.

Criticisms of Brace's findings based upon inflated voter rolls, and indeed, the State's entire argument that the Photo ID Law is justified by these inflated rolls, is unwarranted given that the State itself has the statutory responsibility under the National Voter Registration Act and state law to ensure that the rolls are not inflated. *See*, 42 U.S.C. § 1973gg-6(a)(4); Ind. Code §§ 3-7-38.1-1 to 3-7-38.1-11; and Ind. Code § 3-7-38.2-2. The State has done little to address this problem during the last ten years. (Appendix to Democrats' Summary Judgment Motion, Ex. 26, Interrogatory Nos. 1 and 4, R. Doc. 107).

- C. Absentee voting by mail is not a reasonable alternative for voters lacking the required form of government-issued photo identification.

Among the factors the courts consider in determining whether a burden on the right to vote is severe is whether the law provides a reasonable alternative. *Lubin v. Panish*, 415 U.S. 709, 718 (1974) (absence of alternative means of ballot access); *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (absence of alternative procedure for candidates unable to pay fee required to access ballot); *Belitiskus v. Pizzigrilli*, 343 F.3d 632, 641 (3rd Cir. 2003) (same). The availability of mail-in absentee voting for some voters who are unable or unwilling to obtain the required form of photo identification is not a reasonable or realistic alternative to compliance with the Photo ID Law's requirements.

This Court recently noted that absentee balloting facilitates voting fraud and that absentee voters are more apt to cast invalid ballots than in-person voters on election day due to the unavailability of assistance from election judges. Also, because they often vote days or weeks prior to election day, absentee voters are “deprived of any information pertinent to their vote that surfaces in the late stages of the election campaign.” *Griffin v. Roupas*, 385 F.3d 1126, 1130-31 (7th Cir. 2004). Absentee voters are also “not exposed to the extensive precautions followed by Election Day officials to guard the integrity of the ballots”. *Horseman v. Keller*, 841 N.E.2d 164, 172 (Ind. 2006).

An Indiana voter who desires to vote by mail-in absentee ballot also faces procedural obstacles. If the voter requests an absentee ballot application by mail or fax, as will often be the case with elderly or disabled voters, she must do so at least eight (8) days before the election, Ind. Code §3-11-4-3(4) (2005), and return it so it arrives in time to be delivered to the voter’s precinct election board before the polls close on election day. Ind. Code §3-11-10-3. Indiana does not permit persons under age 65 to vote by absentee ballot unless they are willing to certify under oath that they are within one of the narrow criteria for casting an absentee ballot, which include that a voter has a “specific, reasonable expectation of being absent from the county on election day during the entire twelve (12) hours that the polls are open”. Ind. Code §3-11-10-24(a)(1). For all these reasons, the existence of mail-in absentee voting is not a realistic alternative to the photo identification requirements. *See, Common Cause/Georgia v. Billups*, 406 F.Supp.2d 1326, 1364-65 (N.D. Ga. 2005) (holding that even contemporaneously liberalized mail-in

absentee voting procedure did not constitute a reasonable or realistic alternative to the burdens imposed by Georgia's 2005 photo identification law).

- D. The State did not show that the Legislature actually relied upon any legislative findings that imposter voting exists in Indiana.

There is no evidence that imposter voting has ever occurred in the history of the State or that it threatens the integrity of Indiana's system of public elections. The record is devoid of any studies or other information the Legislature actually considered in enacting the Photo ID Law. Although the State during the course of the proceedings below introduced a plethora of unsworn, unauthenticated material purporting to demonstrate the existence of voter fraud in other states, nearly all of those materials involved fraud that this law does not address and could not have corrected nor detected. (Plaintiffs' Briefs on Motion to Strike, State's Response to Motion to Strike, R. Docs. 101-02, 115-16). More importantly, the State offered no evidence that the Legislature ever considered or relied upon any of this information, some of which was not in existence at the time the Legislature enacted the Photo ID Law. *Id.*

Because the Photo ID Law seeks to regulate a fundamental right, i.e., the right of registered voters to vote and to have their vote counted, it must be strictly scrutinized by this Court to make certain that the *post hoc* reasons asserted for its passage were not pretextual. *Clingman*, 544 U.S. at 603 (O'Connor, J., with Breyer, J., concurring) (heightened scrutiny of election laws imposing more severe burdens helps to insure that those in power are not using election laws as a "pretext for exclusionary or anticompetitive restrictions"); *Burson v. Freeman*, 504 U.S. at 213 (heightened scrutiny is

to enable an independent court to make certain that the legislature was serving the people's interest and not its own); *Metro Milwaukee Commerce v. Milwaukee County*, 431 F.3d 277, 281 (7th Cir. 2005) (observing that a "mismatch" between the government's asserted interest and the challenged law can demonstrate that the government's claimed interest was pretextual).

Though a state interest may be important in the abstract, this does not necessarily mean that a particular law "will in fact advance those interests". The government must show that the recited harms are not only real, but that a law or regulation will, in fact, alleviate those harms in a "direct and material way". *Turner Broadcasting Sys., Inc., v. F.C.C.*, 512 U.S. 622, 664 (1994) (citing *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)). Thus, a law "perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." *Id.* (quoting *HBO, Inc. v. F.C.C.*, 567 F.2d 9, 36 (D.C. Cir. 1977)). The government's asserted rationale for the regulation of expressive activity demands some factual justification to connect that rationale with the regulation in issue, even under the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality opinion) ("This is not to say that a municipality can get away with shoddy data or reasoning. The [government's] evidence must fairly support [the government's] rationale for its ordinance."). And though that factual justification may sometimes be borrowed, the experience of other governments must still be "germane to the measure under

consideration and *actually* relied upon.” *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 313 (2000) (Souter, J., concurring in part and dissenting in part) (emphasis added); *but see Kruse v. City of Cincinnati*, 142 F.3d 907, 916 (6th Cir. 1998) (striking down contribution limits because city relied exclusively on federal experience with national elections to support its contention that they would inevitably prove inadequate at the local level).

The fact of the government’s reliance on this evidence must also be “a matter of demonstrated fact, not speculative supposition.” *City of Erie*, 529 U.S. at 314; *see also Joelner v. Village of Washington Park*, 378 F.3d 613, 624 (7th Cir. 2004); *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631, 639 (7th Cir. 2003) (when enacting legislation to support the regulation of conduct protected by the First Amendment, the government must show that it actually considered evidence that it “‘reasonably believed to be relevant’ . . . so long as the research it relied upon reasonably linked the regulated activity to adverse secondary effects.”) (emphasis added). However, where the First Amendment is implicated and, as here, the “record does not contain any legislative findings or any indication that the [government] considered studies or other information before enacting [the law]”, this Court must apply strict scrutiny. *Joelner*, 378 F.3d at 624.

- E. The severity of the burdens imposed by the Photo ID Law must be evaluated in the context of the cumulative burdens imposed by Indiana’s other election laws.

In evaluating the burdens imposed by a challenged election law, the lower courts have been instructed to examine those burdens not in a vacuum but in the context of a state’s matrix of electoral regulations. As Justice O’Connor recently observed, “A

panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation.” *Clingman*, 544 U.S. at 608-09; *see also Burdick*, 504 U.S. at 441 (concluding that “Hawaii’s prohibition on write-in voting, *considered as part of an electoral scheme that provides constitutionally sufficient ballot access*, does not impose an unconstitutional burden upon the First and Fourteenth Amendment rights of the State’s voters.”) (emphasis added); *Krislov*, 226 F.3d at 859-60 (assessing the character and extent of burdens imposed by state laws requires consideration of practical realities). Notwithstanding the district court’s contrary views (Short App. 96), an examination of other restrictive Indiana election laws is relevant to the analytic approach mandated by Supreme Court precedent.

Indiana’s polls open at 6:00 a.m. and are required to close at 6:00 p.m. Indiana Code §3-11-8-8 (2005). According to the United States Election Assistance Commission, only two other states, Hawaii and Kentucky, mandate the closing of polls as early at 6:00 p.m. All other states require that polls remain open until various times between 7:00 p.m. and 9:00 p.m. *See* www.eac.gov/docs/poll%20hours%20survey.pdf (last visited June 15, 2006).

Indiana, unlike thirty (30) other states, also has no statute allowing voters to take time off work to vote. *See* Business Owner’s Toolkit, <http://www.toolkit.cch.com/columns/people/02-075voting.asp> (last visited June 15, 2006).¹³ Thus, voters who must work late in the afternoon and who forget to bring an acceptable form of photo identification to the polls

¹³ By contrast, Illinois requires employers to give employees two hours off work on election day if they need the time for voting and keeps its polls open until 7:00 p.m., provisions which ameliorate the burdens imposed on working class voters who must find precious time during a day often filled with personal, work and family obligations to vote. *Griffin*, 385 F.3d at 1130.

will not have time to return to their home and obtain such identification before the polls close.

Only twenty (20) states, including Indiana, authorize the use of partisan challengers at the polls. Prior to 2005 challengers were required to remain outside the polling place at the end of the chute. However, as a result of an enactment by the General Assembly in 2005, challengers will now be permitted inside the polling area to challenge voters based on their compliance with the photo identification requirements. *Compare* Ind. Code §3-11-8-15(a)(5) (2005) and §3-11-8-15(a)(5) (2004). This will increase both the likely number of challenges to voters, and the opportunity for abuse, when a challenger questions whether the name on their photo identification “conforms” to the name on the poll book or the voter’s appearance matches the photograph on his or her identification card.

And, as previously mentioned, the Legislature tightened the criteria for voting absentee in 2005. Ind. Code §3-11-10-24(a)(1).

The BMV has closed numerous branches recently. (Short App. 20).¹⁴ Clearly, the greater the distance a registered voter must travel to obtain a photo ID, the greater will be the burden and expense in terms of time and resources.

- F. The Photo ID Law’s ambiguities give overly broad discretion to election officials and challengers to determine whether photo identification “conforms” to the law’s requirements.

¹⁴ According to a list on the BMV website, 29 branches were closed in 2005. *See* www.in.gov/bmv/statistics/2005vs2004.pdf (last accessed June 15, 2006).

Under the Photo ID Law the government-issued photo identification now required from registered voters at the polls in order to vote must contain, in addition to a photograph and expiration date, the voter's name which "conforms to the name in the individual's voter registration record." Ind. Code §3-5-2-40.5(1). By contrast, signatures on other election-related documents require only that the voter's signature "*substantially* conforms with a voter's signature in the records of the county voter registration office." Ind. Code §3-5-6-6 (emphasis added). The absence of the modifier "substantially" in Ind. Code §3-5-2-40.5(1) is significant for two reasons. First, without it, broad discretion is conferred upon partisan poll workers and challengers to determine whether minor variations between the voter's name on his or her photo identification "conform" to the voter's name on the poll book, as a voter who presents what a precinct official determines to be a non-conforming piece of identification will be given a provisional ballot and thus required to make the second trip for validation. Second, the word "conform" is susceptible to more than one interpretation. Merriam-Webster's On-Line Dictionary, www.m-w.com/dictionary/conform (last accessed June 15, 2006) defines the word "conform" as "to be similar or identical". Thus, a member of a precinct election board who determines that "conform" means "similar" would be far more apt to overlook a minor variation between a voter's name on the poll book than would another board member or challenger who interpreted the word "conform" to mean "identical".

When a law threatens to inhibit the exercise of constitutionally-protected rights, a "more stringent vagueness test should apply." *Village of Hoffman Estates v. Flipside*,

Hoffmann Estates, Inc., 455 U.S. 489, 499 (1982); *Gresham v. Peterson*, 225 F.3d 899, 908 (7th Cir. 2000). A law whose material language is open to subjective interpretation and enforcement and which does not “provide explicit standards for those who apply them”, encourages “arbitrary and discriminatory enforcement”. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Grayned v. City of Rockland*, 408 U.S. 104, 108-09 (1972). The “selective enforcement” concern is heightened whenever a law confers discretion in partisan election workers during the highly-charged atmosphere of a political election without providing an effective manner of addressing arbitrary and capricious actions. *Louisiana v. United States*, 380 U.S. 145, 152 (1965); *Delaney v. Bartlett*, 370 F.Supp.2d 373, 385 (M.D. N.C. 2004); *Kay v. Mills*, 490 F.Supp. 844, 852-53 (E.D. Ky. 1980) (noting that the partisan nature of election boards significantly compounds the problems associated with a vague election law).

IV. In light of the fundamental importance of the right to vote, the State has the burden of showing that the Photo ID Law is both necessary and that there was evidence supporting the proffered justification for it.

Obviously, Democrats do not question the State’s legitimate interest in preserving the integrity of its election process.¹⁵ However, mere conjecture either as to the existence of the problem sought to be alleviated or as to the benefits to be gained from the law is not adequate to carry a First Amendment burden. *Watchtower Bible & Tract Society of NY, Inc. v. Village of Stratton*, 536 U.S. 150, 170 (2002). The government bears the

¹⁵ However, the State’s interests are entitled to less weight than they ordinarily would be given because the Photo ID Law applies not only to State and local elections, but also to federal elections. *Council of Alter. Political Parties v. Hooks*, 179 F.3d 64, 73 (3rd Cir. 1999) (state’s interests greater when election law applies only to state and local elections).

burden of showing evidence justifying a law restricting or regulating expressive activity. A mere conclusory claim that a law is designed to counter “fraud” does not meet the State’s heavy burden of demonstrating the necessity for the restriction on First Amendment-protected activity. *Anderson v. Celebrezze*, 460 U.S. at 789 (the state must show that the legitimacy and strength of its interest make it not just desirable but “*necessary*” to burden fundamental constitutional rights); *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (the “times, places, and manner” powers given to the states to regulate even federal elections include the “prevention of fraud and corrupt practices . . . which experience shows are *necessary* in order to enforce the fundamental rights involved”)(emphasis added); *Weinberg v. City of Chicago*, 310 F.3d 1029, 1038 (7th Cir. 2002) (“First Amendment concerns demand more than mere facial assertions”).

The lack of any evidence demonstrating a non-attenuated link between the State’s interest and the claimed evil substantially undermines the plausibility of the State’s claimed justification for the law. *McConnell v. FEC*, 540 U.S. 93, 232 (2003) (quoting *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 391 (2000) (“The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised”). Here, the State’s approach to voter identification is novel, and it has not presented *less* evidence than might otherwise be required to show the need for the Photo ID Law, it has presented *no* evidence that the Legislature actually considered. Moreover, because the utility of a stringent photo identification law as a device to detect and deter in-person imposter

voting is more novel than, for instance, the appearance of the corruptive influence of independent party expenditures, not just any evidence but *convincing* evidence of the necessity for the law was required. *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 617-18 (1996).

V. The Photo ID Law severely burdens Democrats' associational rights.

The Photo ID Law also severely burdens the associational rights of the Democratic Party and its members because it prohibits any person without qualifying identification from casting a ballot that will be counted in Democratic primary elections. Democrats have no desire to exclude from voting in their primary elections registered voters who are unable or unwilling to comply with the law's stringent and burdensome requirements when they cast an election-day ballot.

The right to vote includes the right to vote in a primary election so long as the State has made the primary election an "integral part of the procedure of choice." *United States v. Classic*, 313 U.S. 299, 318 (1941); *Clingman v. Beaver*, 544 U.S. at 610 (O'Connor, J., concurring). The Indiana Supreme Court has declared primary elections to be an integral part of Indiana's election system. *State ex rel. Gramelspacher v. Martin Circuit Court*, 231 Ind. 114, 107 N.E.2d 666, 668 (1952). The First and Fourteenth Amendments protect both the rights of voters and political parties to associate through primary elections, *California Democratic Party v. Jones*, 530 U.S. at 575; *Eu v. San Francisco Democratic Cent. Comm.*, 489 U.S. at 222, and state regulations that impose a severe burden on the associational rights of political parties must be narrowly tailored to

advance a compelling state interest. *Jones*, 530 U.S. at 582; *Timmons v. Twin Cities Area New Party*, 520 U.S. at 358. Thus, a State may enact a law which interferes with a political party's internal affairs only when "necessary to ensure that elections are fair and honest." *Swamp v. Kennedy*, 950 F.2d 383, 386 (7th Cir. 1991) (citing *Eu*, 483 U.S. at 231).

The Photo ID Law transgresses constitutional boundaries by limiting the group of voters whom the Democratic Party may invite to participate in its primary elections to those individuals who have obtained a particular form of photographic identification. The law compels¹⁶ precinct officials, including members of the Democratic Party nominated to serve by party officials,¹⁷ to deny a regular ballot to a registered voter who lacks qualifying identification, even where the precinct officials are personally acquainted with the voter and know them to not only be residents of the precinct, but also members of the Democratic Party. These burdens severely interfere with associational rights protected by the First and Fourteenth Amendments. *Tashjian v. Republican Party of Connecticut*, 479 U.S. at 215-17 (law prohibiting political party from inviting registered voters who were not party members to vote in its primary election subject to strict scrutiny and held unconstitutional). The State's interest in preserving the overall integrity of the electoral process does not justify this completely unnecessary intrusion into the associational freedoms of Democrats and their adherents. *See, Democratic Party of U.S. v. Wisc. ex rel*

¹⁶ A precinct worker who fails to enforce an election law is subject to felony prosecution. Ind. Code §3-14-2-14 (2005).

¹⁷ Ind. Code §3-6-6-1(c) (2005).

LaFollette, 450 U.S. at 125-26.

VI. The Photo ID Law cannot withstand heightened scrutiny.

A. The law's burdens are not equally shared.

To avoid strict scrutiny, the restrictions imposed by an election law must be both reasonable and non-discriminatory. *Timmons v. Twin Cities Area New Party*, 520 U.S. at 358-59. Thus, when a challenged election law imposes unequally shared burdens on fundamental rights, strict scrutiny is necessary to assure that the State's asserted interests are "sufficiently weighty" and that they are served by the unequal burdens imposed.

Reform Party of Allegheny Co. v. Allegheny Co. Dept. of Elections, 174 F.3d 305, 315-18 (3rd Cir. 1999) (*en banc*) (applying intermediate scrutiny); *Rockefeller v. Powers*, 74 F.3d 1367, 1378 n.16 (2nd Cir. 1995) (if ballot access rules impose different appreciable burdens, strict scrutiny applies).

The burdens imposed by the Photo ID Law are not equally shared. Instead, they fall most heavily upon registered voters who are non-drivers¹⁸ and thus do not already possess a driver's license, most of whom must therefore undergo the "difficult and frustrating" process of obtaining a photo identification from the BMV (Short App. 19). Furthermore, voters who reside in a state-certified residential care facility with a polling place face no burdens, while those voters who live in an otherwise identical state-certified residential care facility without a polling place must comply with the law's requirements.

¹⁸ According to the 2000 United States Census, 7.2% of all households in Indiana have no motor vehicle available. (Ex. 53, p. 11; Appendix in Support of State's Summary Judgment Motion, R. Doc. 86).

Ind. Code §3-11-8-25.1(f). Voters have a right to be protected from unequal regulatory burdens under the Equal Protection Clause of the Fourteenth Amendment, *Williams v. Rhoads*, 393 U.S. 23 (1968); *Schrader v. Blackwell*, 241 F.3d 783, 788 (6th Cir. 2001), particularly those that the State has not shown are even remotely necessary to promote electoral integrity.

The burdens imposed by the law also fall unequally on those voters who are least able to absorb the expenses associated with obtaining the documents, such as a certified copy of one's birth certificate, that are required to obtain a photo ID from the BMV. (Hershey Report 17, Jt. App. 201). The law requires that voters, including indigent voters, without the required form of photo identification make a minimum of two trips, the first to the polls to cast a provisional ballot, and the second to the county election board's office to sign an indigency affidavit. Ind. Code §3-11.7-5-2.5(c)(2)(A). These unequal burdens are not justified by any countervailing State interest.

B. The Photo ID Law cannot survive strict scrutiny.

Strict scrutiny mandates that governmental regulation at issue be justified by a compelling governmental interest and be narrowly tailored to serve that interest. The narrow tailoring inquiry requires that this Court ask whether the statute sweeps too broadly and whether there are "other, reasonable ways to achieve th[e] goals with a lesser burden on constitutionally-protected activity." *Doe v. City of Lafayette*, 377 F.3d 757, 773 (7th Cir. 2004).

There is little question that if the Legislature determined to require voters to

produce forms of identification at the polls, there were far less restrictive alternatives available than the one which was selected. First it could have expanded the list of acceptable forms of identification to allow a range of alternative documents, such as Congress deemed acceptable when it enacted the HAVA identification requirements for first-time voters who have registered by mail, 42 U.S.C. §15483(b)(2)(A)(i) and (ii), if it were intent on applying the law to all or most voters. States which have adopted this approach have successfully defended their voter identification laws against constitutional challenges. *See, e.g., League of Women Voters v. Blackwell*, 340 F.Supp.2d 823 (N.D. Oh. 2004); *Bay County Democratic Party v. Land*, 347 F.Supp.2d 404 (E.D. Mich. 2004).

Second, to alleviate the burdens on the indigent, the State could have permitted the signing of indigency affidavits, or affidavits of identity, at the polls on election day, rather than requiring persons who do not own driver's licenses to make a second trip, often one of considerable distance, to the county election board to either sign an indigency affidavit or validate one's provisional ballot with a permissible form of identification. The second trip requirement, which will invariably be imposed on non-drivers, is unreasonably and unnecessarily burdensome.

Third, this Court could conclude that the least restrictive means of detecting and deterring whatever voting frauds may be feared are those devices already in place, such as the criminal penalties for voting fraud, *Dunn*, 405 U.S. at 353, and the pre-existing signature comparison process, coupled with the close oversight of elections by bi-partisan precinct boards and watchers.

Narrow tailoring also requires that a statute not be overinclusive or underinclusive. A narrowly tailored law is one that actually advances the State's interests (is necessary), does not sweep too broadly (is not overinclusive), and does not leave significant influences bearing on the interest unregulated (is not underinclusive). The underinclusiveness of a law casts doubt on the state's purpose in enacting it and undermines the strength of that purpose. *Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002); *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994) (exemptions from otherwise legitimate regulations of speech "may diminish the credibility of the government's rationale for restraining speech in the first place"); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 67 n.27 (1976) ("If some groups are exempted from a prohibition [purported to uphold a state interest], the rationale for regulation is fatally impeached"). The Photo ID Law exempts absentee voters who cast their ballots by mail, the one category of voting that *has* experienced fraud,¹⁹ as well as most residents of state-licensed residential health care facilities. It thus suffers from facial underinclusiveness, which is normally a fatal defect under the strict scrutiny analysis. This underinclusiveness also is indicative that the statute is not a reasonable fit between the asserted objective (detecting and deterring imposter voting) and the means by which the statute seeks to obtain that goal. *Pearson v. Edgar*, 153 F.3d 397, 404 (7th Cir. 1998).

The Photo ID Law is also overinclusive. By requiring an unnecessarily limited

¹⁹ The Legislature excluded mail-in absentee ballots from the law despite the fact that the only documented voter fraud in Indiana has occurred in connection with absentee balloting. *Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004).

form of personal identification from registered voters, whose identity is disputed by no one, or who are willing to sign an affidavit of identity, it sweeps too broadly. Other states, as well as the federal government, have adopted a variety of far more tailored approaches, such as HAVA does in limiting identification requirements to a small subset of newly-registered voters who registered by mail, and/or permitting a voter to identify himself with a far more comprehensive array of documents, or by permitting a voter without any form of personal identification to sign an affidavit of identity. The approaches taken by other jurisdictions is relevant to the narrow tailoring inquiry. *See, e.g., McConnell v. F.E.C.*, 540 U.S. at 232 (Rehnquist, C.J., delivering the opinion of the Court with respect to miscellaneous Title III and IV provisions of the Bipartisan Campaign Reform Act of 2002, and observing that other states had adopted more narrowly tailored approaches to the problem the government was seeking to correct).

C. The Photo ID Law cannot survive intermediate scrutiny.

Even if this Court were to be persuaded that the *Burdick* sliding-scale analysis has somehow supplanted the strict scrutiny regime of *Dunn v. Blumstein* and its progeny for direct infringements of the right to vote, a pure rational basis review as applied by the district court does not automatically follow. An election regulation “which imposes only moderate burdens could well fail the [*Burdick*] balancing test when the interests that it serves are minor.” *McLaughlin v. No. Car. Bd. of Elections*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995); *see also, New Alliance Party v. Hand*, 933 F.2d 1568, 1576 (11th Cir. 1991) (even though election regulation found not to impose a severe burden, the state’s asserted

interests did not adequately justify the restriction and there were less drastic measures available to achieve its ends). An election law that imposes a relatively minor burden would fail the *Anderson/Burdick* test if the restrictions imposed are unreasonable or discriminatory, or that, in balancing the legitimacy and strengths of the relative interests served, it is determined that those restrictions are unnecessary. *Anderson v. Celebrezze*, 460 U.S. at 788-89. Intermediate scrutiny has been applied not only to commercial speech regulations, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 569 (1980), but also to challenges to certain state election laws. *Timmons*, 520 U.S. at 358-59 (anti-fusion statute); *Wirzburger v. Galvin*, 412 F.3d 271, 279 (1st Cir. 2005) (state constitutional provision prohibiting ballot initiatives on a particular subject); *Reform Party of Allegheny County*, 174 F.3d at 315 (*en banc*) (Pennsylvania statute barring cross-nomination of candidates by minor parties but not by major parties); *Medina v. City of Osawatomie*, 992 F.Supp. 1269, 1275-76 (D. Kan. 1998) (holding that the *Burdick* formulation requires an inquiry approximating intermediate scrutiny where a statute impacts asserted First and Fourteenth Amendment rights, even one that is reasonable and non-discriminatory).

In order to withstand intermediate scrutiny, the State must carry the burden to demonstrate an evidentiary basis for its actions, not merely rely on speculation and conjecture, and it must show that the harms the government cites are real, that its restrictions will in fact alleviate them to a “material degree,” *Thompson v. Western States*

Med. Ctr., 535 U.S. 357, 373 (2002); *Edenfield v. Fane*, 507 U.S. at 770-71 (“It is well established that ‘[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it’”); and that its regulation “is not more extensive than is necessary to serve governmental interests.” *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. at 566. Although government can rely on whatever evidence it “reasonably believed to be relevant to the problem” the law seeks to address, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986), and it should be permitted to “respond to potential deficiencies in the electoral process with foresight rather than reactively”, *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986), without providing “elaborate, empirical verification,” *Timmons*, 520 U.S. at 364, the government’s response must always be reasonable given the interest the restriction served and not significantly impinge on constitutionally-protected rights. *Munro*, 479 U.S. at 196.

The State has wholly failed to make a showing either that the Photo ID Law is necessary, i.e., that imposter voting is a real problem in search of a solution, rather than a cure in search of a disease, or that the law will ameliorate the State’s professed concerns in a way that will not chill more speech (i.e., voting) than the amount of in-person voter fraud it might detect or deter. *Citizens for John W. Moore Party v. Bd. of Election Comm’rs*, 794 F.2d 1254, 1259 (7th Cir. 1986) (“when the ‘strictness’ of a regulation comes at substantial cost in constitutionally protected entitlements. . . . a comparison of

marginal gains against marginal losses is necessary”). The district court improperly placed the burden on the Plaintiffs to negative the State’s conclusory assertions that imposter voting is a problem in need of a solution, rather than requiring the State to come forward with a sufficient legislative justification for its novel approach in effectively requiring a “license” to vote.

CONCLUSION

The district court’s judgment should be reversed, and the case should be remanded to the district court with instructions that summary judgment be entered in favor of Democrats and against the State and County Defendants.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,716 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated this 19th day of June, 2006.

William R. Groth

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**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

No. 06-2218:

| | | |
|-----------------------------------|---|-----------------------------------|
| WILLIAM CRAWFORD, <i>et al.</i> , |) | |
| |) | |
| Plaintiffs-Appellants, |) | Appeal from the United States |
| |) | District Court for the Southern |
| v. |) | District of Indiana, Indianapolis |
| |) | Division |
| |) | |
| MARION COUNTY ELECTION |) | Cause below: No. 1:05-CV-634 |
| BOARD, |) | |
| |) | |
| Defendant-Appellee. |) | Hon. Sarah Evans Barker, Judge |

No. 06-2317:

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| INDIANA DEMOCRATIC PARTY, |) | |
| <i>et al.</i> , |) | Appeal from the United States |
| |) | District Court for the Southern |
| Plaintiffs-Appellants, |) | District of Indiana, Indianapolis |
| |) | Division |
| v. |) | |
| |) | Cause below: No. 1:05-CV-634 |
| TODD ROKITA, <i>et al.</i> , |) | |
| |) | |
| Defendants-Appellees. |) | Hon. Sarah Evans Barker, Judge |

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of June, 2006, two (2) copies of the foregoing Brief of Appellants was mailed by first class U.S. Mail, postage prepaid to each the following:

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| Defendants-Appellees. |) | Hon. Sarah Evans Barker, Judge |

STATEMENT PURSUANT TO CIRCUIT RULE 30(d)

Come now Appellants Indiana Democratic Party and Marion County Democratic Central Committee, by their counsel of record, and pursuant to Circuit Rule 30(d) certify that the Appendix in this cause, consisting of a Short Appendix bound in this volume and the Joint Separate Appendix separately submitted by all Appellants contain all the materials required by Circuit Rule 30(a) and (b). Specifically, the Short Appendix

contains the trial court's Judgment and Entry. Pursuant to Circuit Rule 30(b)(6), appellants have also included short excerpts from the record in this cause which are important to a consideration of this matter.

Counsel further certifies that none of the materials in the Appendix are available electronically with the exception of the trial court's Judgment and Entry. These latter appendix documents are included in the electronic filing as required by Circuit Rule 31(e).

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STATUTORY APPENDIX
THE INDIANA PHOTO ID LAW

